MICHIGAN ASSOCIATION OF PLANNING

A Chapter of the American Planning Association

Policy Statement on the Takings Doctrine and the Exercise of the Power of Eminent Domain

This policy statement provides a concise statement of the policy position of the Michigan Association of Planning with regard to the application of Michigan's constitutional takings doctrine (Michigan Constitution Art. X, Section 2) to the exercise of the power of eminent domain by state and local units of government. A full policy guide providing the background and reasoning behind this policy statement has been provided in a separate document and is available from MAP.

Policy Statement

The Michigan Association of Planning:

- Strongly supports the protection of the rights of a property owner to the full and reasonable use of his or her property, so long as that use does not cause harms to neighboring property owners or the larger community, and recognizing that these property rights may be reasonably limited by the lawful exercise of zoning, subdivision, land division, condominium and related regulations as so determined by state and federal courts.
- Strongly supports the constitutional exercise of the power of eminent domain as defined by the Michigan Supreme Court in the *Wayne County v. Hathcock* decision, 471 Mich. 445 (2004), in holding that the power of eminent domain can be used by a community for traditional "public use" purposes, including the eradication of blight , but that the taking and transfer of property from one private party to another private party solely for the purpose of promoting economic development, even pursuant to a comprehensive planning effort, does not qualify as a "public use" under the state's constitutional takings doctrine, and thus does not provide a sufficient justification for exercising the power of eminent domain.
- Supports legislative initiatives in the Michigan Legislature that would effectively codify the *Hathcock* decision statutorily or by constitutional amendment,[1] so long as that legislation does not prohibit the use of the power of eminent domain by a local unit of government for the purpose of eradicating blight as legislatively defined.
- Supports the ability of local and state government to use eminent domain for the purpose of eradicating blight when preceded by a proper planning effort that involves all key stakeholders, including the property owners in question, and is embodied in a public plan that documents the public purposes and necessity for the exercise of eminent domain.
- Supports the efforts of local and state government to use eminent domain only after all other reasonable, lawful, and less egregious measures have first been tried and failed.

The Michigan Association of Planning believes that this interpretation of the takings doctrine comports with well established and long-standing constitutional doctrine, as articulated by the Michigan Supreme Court in its *Hathcock* decision, and strikes the proper balance between the rights of private property ownership and the responsibilities of state and local government to provide for public infrastructure and to alleviate conditions of blight.

[1] Including for example House Bill 5060, which would amend 149 PA 1911 (MCL § 213.32), or any similar legislation that might be introduced and that would provide for a parallel constitutional amendment.

MICHIGAN MAP ASSOCIATION OF PLANNING

A Chapter of the American Planning Association

Policy Guide and Statement on the Takings, Substantive Due Process, and Regulatory Takings Doctrines

Adopted October 5, 2005

Executive Summary

Background

Two powers inherent in our national and state governments since the founding of this country are the power of eminent domain and the police power. The federal government, which can only exercise those powers granted to it by the U.S. Constitution, has the power of eminent domain, but not the police power. The states, which are "plenary" powers and can exercise any power of government unless superseded by federal law, have both the power of eminent domain and the police power. The power of eminent domain allows a government to take title to private property against the owner's wishes. The police power allows a state or local government to regulate private activities, including the use of private property, for the purpose of protecting public health, safety, morals, and the general welfare. Both of these powers are vital for the healthy functioning of a system of self governance, but both can be abused and are not absolute.

A defining characteristic of the U.S. system of constitutional democracy is that the federal and state constitutions protect individual liberties and property rights by limiting governments' ability to use the power of eminent domain and the police power. The Fifth Amendment to the U.S. Constitution, along with parallel provisions in state constitutions, limits the power of eminent domain. The Fourteenth Amendment, along with parallel state constitutional provisions, limits the exercise of the police power. Through a long history of constitutional adjudication, the U.S. Supreme Court and the state supreme courts have developed sets of rules for interpreting and applying these protections, which are known as the "takings," "due process," and "regulatory takings" doctrines. *It is very important that local government officials, especially planners and planning commissioners, understand these three doctrines so that they can ensure that the plans and regulations they adopt are both reasonable and consistent with the constitutional protections the doctrines afford, which in turn will help ensure that their plans and regulations are defensible politically and legally.*

The *takings doctrine*, based on the Fifth Amendment to the U.S. Constitution, limits the exercise of the power of eminent domain. The courts have interpreted the takings clause to include two requirements: first, that private property can be taken only for some "public use" and, second, that government must provide "just compensation" when it takes the property. The courts have generally held that "just compensation" means fair market value at the time that the government began condemnation proceedings. The "public use" requirement has been more troublesome. Here the courts have generally held that public use includes situations where the property in question will actually be made available for public use (i.e., either by the public agency or a private entity like a common carrier), such as a

public road or railroad. The courts have also found the public use requirement satisfied when the taking is done as a way to address "exigencies" like blight. Recently, the U. S. Supreme Court held with regard to the U.S. Constitution's takings clause that public use also encompasses a taking made for the public purpose of promoting economic development and revitalization, *so long as* it can be justified pursuant to a well-developed, comprehensive economic redevelopment plan. In one case where a state doctrine differs from federal doctrine, however, the Michigan Supreme Court recently held that under the *state's* constitutional takings clause, "public use" does not extend so far. Specifically, in Michigan it does not allow takings that would be made solely for the purpose of advancing a general economic benefit.

The *due process doctrine* stems from the Fourteenth Amendment of the U.S. Constitution, which requires that life, liberty, and property cannot be taken (or regulated) without due process of law. This clause limits state and local governments' ability to exercise the police power. Under this doctrine, the courts require that governmental regulation bear a "reasonable relationship" to a "legitimate" state purpose. In effect, courts enforcing this doctrine ask two questions: first, whether the burdens of the regulation are proportional to the ends to be achieved and, second, whether the end itself is one that the government is entitled to pursue. Because the U.S. Supreme Court is very reluctant to replace its determination for that of a legislature on whether a public policy is good or poor (i.e., legitimate), it is generally very deferential to legislative actions like local land use regulations, unless some fundamental constitutional issue is at stake. The use of private property for economic gain, by itself, does not rise to that level. State and local regulations relating to planning and land use regulation, therefore, are generally found permissible under the doctrine, unless they are clearly arbitrary and capricious. The Michigan courts have generally followed the U.S. Supreme Court's approach in interpreting the state's constitutional due process doctrine.

Finally, the *regulatory takings doctrine* was established by a U.S. Supreme Court ruling in the 1920s. It essentially converts a regulation—normally limited by the due process clause—into a "taking" when a court finds that a government has so restricted an owner's use of the property that it has in effect taken it, but has done so through regulation rather than by taking title through a condemnation. One of the murkier areas of constitutional law, the doctrine incorporates several "categorical rules" that apply in extreme cases (i.e., when all economic value is taken or the regulation compels a property owner to allow others to use it). Beyond those extremes it requires a court to engage in a case-specific balancing for each complaint to determine whether the government has forced some property owner alone "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." If so, then the regulation will be deemed a taking and the government will be required to pay just compensation.

MICHIGAN ASSOCIATION OF PLANNING

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Policy Guide on the Takings, Substantive Due Process, and Regulatory Takings Doctrines

Introduction

The *Preamble* to the United States Constitution reads:

> We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

From this beginning, the founders of our country established a form of government unique in the history of the world—the constitutional democracy. The constitution they crafted does two things: it constitutes the national government for the purpose of safeguarding a larger public welfare, and it constrains that government's ability to limit the freedoms of its citizens. Each of the several states of the United States of America, including the State of Michigan, has adopted a state constitution that does the same two things. A fundamental difference between the national and state governments, however, is that the national (or "federal") government is one of "enumerated" powers, authorized to exercise *only* those powers given to it by the U.S. Constitution, while the state governments are "plenary" powers, broadly authorized to act in order to promote the public welfare *except* when superseded by national law or constrained by their own state constitutions. Thus, in addition to establishing a constitutional democracy, the U.S. Constitution along with separate state constitutions also established a "federalist" form of government.

The founders did not design this unique experiment in self-governance from scratch. Rather, they built upon a well-established body of Anglo-Saxon law imported from Great Britain. Two of the well-settled powers of government that they incorporated into the new U.S. system were the power of eminent domain and the police power. The power of eminent domain is not expressly provided for in the U.S. Constitution, but the national government's ability to exercise the power is expressly constrained by the Bill of Rights (this constraint is discussed in more detail below). Because of that constraint, the U.S. Supreme Court has held that national government's power of eminent domain is necessarily implied by the Constitution. It is thus available to both the national and state governments. It describes the power of government to appropriate private property for public use. The police power, in contrast, is neither expressly nor impliedly provided for in the U.S. Constitution. It is available to the states, therefore, but not the national government. The police power describes the power of state

and local governments to regulate private behaviors, including the use of private property, for the purpose of promoting or safeguarding public health, safety, morals, and general welfare.

The availability of these two powers is vitally important for the healthy functioning of a system of self governance. Even so, those powers can be abused and should not be absolute. A defining attribute of the U.S. system is that the federal and state constitutions do not only provide for these powers, but they also place important constraints on their use. The U.S. Constitution checks the federal government's ability to exercise the power of eminent domain and its other enumerated powers through the Fifth Amendment, one of the amendments that comprise the Bill of Rights. This amendment reads, in part:

> No person shall...be deprived of life, liberty, or property without due process, of law; nor shall private property be taken for public use, without just compensation.

The first of these two clauses is referred to as the "due process" clause, while the second is referred to as the "takings" clause. The U.S. Supreme Court has held that the Fifth Amendment's takings clause also limits a state's ability to exercise the power of eminent domain by virtue of the "incorporation doctrine." In contrast, a state's ability to exercise the police power is constrained directly by the Fourteenth Amendment, one of the Civil Rights Amendments, which applies specifically to the states. It provides, in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

State constitutions contain similar limitations. The Constitution of the State of Michigan incorporates a due process clause in Article I, Section 17, which is identical to the federal due process clause. Michigan's constitution also provides a takings clause in Article X, Section 2, which reads:

> Private property shall not be taken for public use without just compensation therefore being first made in a manner prescribed by law.

Having recognized the power the eminent domain and the police power, and having constrained the use of those powers though the takings and due process clauses, the trick becomes to decipher what exactly the reach and limits of those two powers are, or stated another way, what the takings and due process clauses actually mean. The U.S. Supreme Court's adjudication of claims made under these two clauses over the years has established sets of rules that are known as the "takings doctrine" and the "due process doctrine." In addition, through its own adjudication almost a century ago, the Court established the so-called "regulatory takings doctrine." This doctrine does not apply to a direct appropriation of private property (i.e., through an act of eminent domain), but rather to a regulation enacted under the police power that nonetheless has the *effect* of appropriating private property for public use, for all intents and purposes.

Given this introduction, the purpose of this document is to provide brief background discussions of the takings, due process, and regulatory takings doctrines separately, and then to articulate policy statements with regard to each of these doctrines. Before doing so, however, it would be helpful to briefly note two aspects of constitutional adjudication that are vitally important for understanding the application of these three doctrines.

The first of these is the separation of powers doctrine, which is embodied in the U.S. Constitution and the state constitutions through the establishment of co-equal branches of government: the legislative,

the executive, and the judiciary. Early in the history of this country, the U.S. Supreme Court held that it has the final say when it comes to interpreting the U.S. Constitution, and this authority has never since been seriously contested. Even so, since the 1930s the Court has continually expressed great reluctance to set aside laws enacted by the federal or a state legislature, which can essentially amount to replacing its own judgment for the legislatures on what amounts to a good or poor public policy.

Because of this reluctance, the Court has developed different "tests" or levels of scrutiny that it applies when adjudicating constitutional claims. In general, it scrutinizes a governmental action more closely (i.e., giving less deference to legislative judgments) when the claim speaks to a fundamental right guaranteed by the constitution (e.g., a regulation that allegedly suppresses political speech or that was motivated by racial discrimination). Conversely, it scrutinizes a governmental action less closely (i.e., giving greater deference to legislative judgments) when a fundamental constitutional right is not implicated. For the most part, governmental regulations of economic activities that implicate the takings, due process, and regulatory takings clauses are treated deferentially by the courts, as will be discussed in more detail where appropriate below.

The second attribute of constitutional adjudication worth noting here stems from the so-called supremacy doctrine. This doctrine establishes the U.S. Constitution—along with the national laws properly enacted under it—as the supreme law of the land. The doctrine requires that a given state government (as well as its local governments) comply with the constitutional protections afforded both by the U.S. Constitution and by its own state constitution. In practice, this means that a state can never pass laws that abrogate federal constitutional rights. Moreover, a state supreme court can never interpret either its own laws or its own state constitution in a way that affords *less* protection to an individual than is provided by the U.S. Constitution (meaning, for example, that a state supreme court can never uphold a state law that violates the U.S. Constitution's takings clause). Sometimes, however, a state can provide state constitutional protections that are *more* stringent than those provided by the U.S. Constitution (finding, for example, that while a state or local regulation may not violate the U.S. Constitution's takings clause, it does violate the state constitution's takings clause). For the most part, the state supreme courts generally follow the lead of the U.S. Supreme Court in adjudicating constitutional protections, including those afforded by their own state constitutions. This is generally true for the Supreme Court of the State of Michigan, with one important exception, as is discussed in more detail with regard to the takings clause below.

Background

The Takings Doctrine

The power of eminent domain is the power of a governmental agency—national, state, or local—to take title to private property through the legal action of condemnation.[2] While it can do so even against the will of the property owner, however, this power is not absolute. The takings clause of the Fifth Amendment to the U.S. Constitution provides that government may not exercise the power of eminent domain unjustly. Under the U.S. Supreme Court's takings doctrine, this clause is read to contain two

[2] States have the power of eminent domain by virtue of their status as "plenary" powers or sovereigns, although the ability of any given state to exercise that power may be constrained by state constitutional or statutory provision. The courts have generally ruled that local governments, as so-called "creatures of the state," have the ability to exercise the power of eminent domain only when that power is expressly delegated to them by the state through constitutional or statutory provision.

basic elements: (1) property may be taken *only* for a public use; and (2) when it is taken, the government must provide just compensation. Of these two elements, the second has proven to be less problematic. While property owners may not always be happy, the Court has held that "just compensation" amounts essentially to the fair market value of the property at the time that the condemnation action is taken.

The first element of the takings clause, in contrast, has proven to be more problematic and controversial. The problem comes from deciding what amounts to a "public use," which is for the most part a public policy decision. As such, the Court's efforts to define "public use" for constitutional purposes necessarily raises the difficult question of whether and how far it should go in setting aside a legislature's decision on what amounts to a public use. This question was at the core of a recent decision handed down by the U.S. Supreme Court in *Kelo v. City of New London,* 545 U.S. ___ (2005).

Traditionally, the courts have interpreted "public use" to encompass a taking of private property when that property will in fact be taken by a public agency for use by the public, "such as for a road, a hospital, or a military base" (*Kelo v. City of New London,* 545 U.S. at ___, O'Connor, dissenting). Similarly, the courts have recognized the transfer of property from one private party to another private party, often a "common carrier," as a valid public use *if* the party taking the property will make it available for public use, "such as with a railroad, a public utility, or a stadium" (*id.*). Beyond those two situations, the courts haven even interpreted "public use" to encompass the transfer of property from one private party to another private party in "certain circumstances and to meet certain exigencies" (*id.*), the paradigmatic examples of "certain exigencies" being the need to address blight (*Berman v. Parker,* 348 U.S. 26 (1954)) and the need break apart harmful oligopolistic land ownership patterns (*Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984)).

A clearly established *limit* on the reach of "public use," in contrast, is that government "may not take the property of *A* for the sole purpose of transferring it to *B*, even though *A* is paid just compensation" (*Kelo v. City of New London,* 545 U.S. at ___.) The hard cases arise when government uses the power of eminent domain to involuntarily transfer property from one private party to another in a way that yields some amount of private benefit to the taking party (as is typically the case) *and* where the public's actual use of the property or the existence of extenuating circumstances are not so clear. Because the transfer of property from one private party to another has long been permissible as long as there is a valid "public use" behind the taking, even if it has the secondary or unintended effect of enriching the party taking the property, the takings doctrine has generally been read to be very deferential toward legislative determinations about what amounts to a "public use." Even so, how deferential the court should be was essentially the key question addressed by the *Kelo* case, and the Court split on how that question should be answered.

Specifically, the issue in *Kelo* was whether the condemnation and transfer of property from one private party to another, as part of a comprehensive planning effort to promote economic development and revitalization *by itself* (i.e., without a demonstration of blight or other such exigencies, and where at least part of the property would not be open to public use), constituted a valid "public use" for the purposes of the takings clause. In a five-member majority opinion written by Justice Stevens, the Court concluded that it was. Pointing primarily to a longstanding policy of deference to legislative judgments and the difficulties of effecting a literal interpretation of the term "public use," the Court held that the takings doctrine encompasses a "broader and more natural interpretation of public use as 'public purpose'" (*Kelo v. City of New London,* 545 U.S. at ___).

In reaching this conclusion, the Court took pains to note that the City of New London was not condemning the property in question simply to confer a benefit on a private party, but was doing so pursuant to a well-developed, comprehensive plan for the economic revitalization of the entire planning area. In other words, a mere declaration on the part of government that a condemnation is required to yield some economic benefit, absent such a thorough and comprehensive planning justification, would not likely pass judicial muster.[3] It also rejected the use of a "bright-line" rule that would have declared any taking for the purpose of promoting economic development to be outside the reach of "public use," as well as a requirement that government be able to demonstrate with "reasonable certainty" that the expected public benefits of the taking would in fact accrue (both of these positions were called for by opponents of New London's condemnation action).

Altogether, the "takings doctrine" as it currently stands at the federal level allows public agencies to "take" private property through condemnation proceedings so long as it pays just compensation and the taking is made to advance some public use. The Court has declared that it will defer to legislative judgments and read "public use" broadly as "public purpose." That is, a taking will be deemed by the courts as an acceptable public use when the property in question will actually be made available for public use (i.e., either by the public agency or a private entity like a common carrier). It will also defer to the legislature when the condemnation is undertaken as a means to address "exigencies" like blight, or even for the sake of promoting economic development and revitalization, *so long as* the latter can be justified pursuant to a well-developed, comprehensive economic development and revitalization plan. Takings undertaken for the sake of promoting economic development without such extensive justification will not likely receive such deferential treatment.

It is important to note that this summarizes the state of the *federal* takings doctrine, not the State of Michigan's takings doctrine. In the early 1980s, the Michigan Supreme Court handed down a decision that established a takings doctrine paralleling in many ways the *Kelo* decision just reached by the U.S. Supreme Court. *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 304 NW2d 455 (1981). The *Poletown* decision upheld the condemnation of private properties in the Poletown neighborhood of metropolitan Detroit by an economic development corporation so that the property could be transferred to the General Motors Corporation for the construction of a new manufacturing facility. The Michigan Supreme Court reasoned in *Poletown* that the "public use" constraint on the exercise of eminent domain was broad enough to encompass the kinds of economic benefits anticipated from the proposed development project.

The Michigan Supreme Court recently reversed itself, however, in the case of *Wayne County v. Hathcock*, ___ Mich. ___ (2004). In *Hathcock*, the Wayne County Commission attempted to condemn private properties located near to the Wayne County Metropolitan Airport so that those properties could be incorporated into an integrated redevelopment project that would create a business and technology park and conference center to be located adjacent to the airport. Relying heavily on the *Poletown* decision, the County Commission reasoned that the economic development benefits to be gained through this project constituted a valid "public use" for the purpose of exercising its eminent domain powers. The property owners contested the County's action.

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[3] Justice Kennedy joined the majority opinion, but also wrote a concurring opinion to stress this point, asserting that judicial deference to a legislature should not be stretched too far and that "transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause." *Kelo v. City of New London*, 545 U.S. ___, ___ (2005) (Kennedy, concurring).

In deciding *Hathcock*, the Michigan Supreme Court revisited the takings doctrine as provided for under the state constitution and identified three distinct situations encompassed by the "public use" requirement, including:

- Situations involving a "public necessity of the extreme sort otherwise impracticable" (*Wayne County v. Hathcock*, ___ Mich. at ___ (2004), citing *Poletown, supra* at 616 (Ryan, dissenting)). This addresses the taking of private property for the development of things like highways, railroads, canals, and other such "instrumentalities of commerce."

- Situations where the private entity "remains accountable to the public in its use of the property" (*Wayne County v. Hathcock*, ___ Mich. at ___ (2004), citing *Poletown, supra* at 677 (Ryan, dissenting)). This addresses the taking of private property, for example, to facilitate development of a petroleum pipeline that would remain subject to oversight by the Michigan Public Service Commission.

- Situations where the "selection of land to be condemned is itself the subject of public concern" (*Wayne County v. Hathcock*, ___ Mich. at ___ (2004), citing *Poletown, supra* at 680 (Ryan, dissenting)). This addresses the taking of property, for example, in order to eradicate blight.

Having identified these valid meanings of the "public use" requirement, the Michigan Supreme Court specifically rejected the argument that a "generalizable economic benefit" was among them. In other words, the court declared that the taking and transfer of property from one private party to another for the purpose of promoting economic development, even pursuant to a comprehensive planning effort, does not qualify as a "public use" under the state's constitutional takings doctrine, and thus does not provide a sufficient justification for exercising the power of eminent domain. Concluding that the reasoning used in *Poletown* was an unwarranted departure from the state's traditional constitutional doctrine, the court then specifically overruled the *Poletown* decision.[4]

In sum, the takings doctrine has undergone some refinement at the federal and especially the state level with several recent and important constitutional decisions. As it stands, the federal takings doctrine is somewhat broader, encompassing within the "public use" requirement things like broad economic development benefits when those benefits are pursued through a well-developed planning effort. In the State of Michigan, however, the state constitutional takings doctrine is more stringent, allowing the condemnation of private property only for "public uses" that are more narrowly confined and expressly do not include economic development benefits alone. This is a case where the state constitutional doctrine provides more constitutional protection of private property rights than does the federal, and as such takes precedent in the State of Michigan when it comes to adjudicating state or local efforts to exercise the power of eminent domain.

[4] It is interesting to note that the dissenting opinion in *Kelo*, written by Justice O'Connor and joined by the other three dissenting justices, would *not* have interpreted the "public use" requirement for the federal takings doctrine to encompass generalizable economic benefits, employing reasoning that roughly paralleled that used by the majority in the *Hathcock* decision in ruling on the state's takings doctrine.